No. 97-6146

In The

Supreme Court of the United States

October Term, 1997

ANGEL J. MONGE,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of California

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON BEHALF OF PETITIONER

ROBERT WEISBERG
Counsel of Record
Stanford Law School
Stanford, CA 94305
(650) 723-0612
Counsel for Amicus Curiae NACDL

DAVID M. PORTER
Co-Chair NACDL
Amicus Committee
801 K Street,
10th Floor
Sacramento, CA 95814
(916) 498-5700

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QUESTION PRESENTED

Does the Double Jeopardy Clause apply to noncapital sentencing proceedings that have all the hallmarks of a trial on guilt or innocence?

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OPINION BELOW

The opinion of the California Supreme Court is reported as *People v. Monge*, 16 Cal.4th 826, 66 Cal. Rptr. 853, 941 P.2d 1121 (1997).

STATEMENT OF INTEREST OF AMICUS NACDL[1]

Founded in 1958, the National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 9,000 members nationwide – along with 78 state and local affiliate organizations numbering 28,000 members – including private defense lawyers, public defenders, and law professors. NACDL's mission is to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. It is also committed to preserving fairness within America's criminal justice system. NACDL has a long tradition of safeguarding the rights of all persons involved in the criminal justice system along with preserving and strengthening our adversary system of justice.

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amicus states that no counsel for a party authored this brief on whole or in part, and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

NACDL submits this brief because of the great significance of resolving issues of double jeopardy in noncapital sentencing proceedings in the United States.

JURISDICTIONAL STATEMENT

The California Supreme Court issued its opinion on August 27, 1997. Petitioner filed a petition for writ of certiorari with this Court on September 29, 1997. The Court granted the writ on January 16, 1998. This court has jurisdiction pursuant to 28 U.S.C. § 1275(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Double Jeopardy guarantees of the Fifth Amendment to the United States Constitution, the Due Process guarantee of the Fourteenth Amendment, and California Penal Code sections 667.1170.12, and 1192.7.

In relevant part, the Fifth Amendment provides that "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy . . . "

The Fourteenth Amendment provides:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Penal Code sections 667, 1170.12, and 1192.7 are set forth in the Appendix to Petitioner's Brief on the Merits, which is incorporated by reference herein.

STATEMENT OF THE CASE

Amicus adopts and herein incorporates by reference the Statement of the Case in Petitioner's Brief on the Merits.

SUMMARY OF ARGUMENT

Bullington v. Missouri is not limited to capital cases. It relies on principles of double jeopardy which necessarily apply to noncapital sentencing proceedings which, like the penalty phase in *Bullington*, bear the "hallmarks" of a trial on guilt or innocence. The so-called "death-is-different" doctrine is limited to a certain class of cases decided under the Eighth Amendment, and to read *Bullington* as a "death-is-different" case would lead to a widening of that "death-is-different doctrine" antithetical to this Court's well-established views on death penalty law.

The California Supreme Court decision in *Monge* requires reversal because it rests on, and thereby encourages, egregious misunderstandings of *Bullington*, of the relationship between Eighth Amendment death penalty jurisprudence and the court's more generally applicable criminal procedure doctrines, and of the relationship

between state-created statutory rights and federal constitutional rights.

ARGUMENT

I. THERE IS NO "DEATH IS DIFFERENT" DOCTRINE BY WHICH *BULLINGTON* CAN BE LIMITED TO CAPITAL CASES

A. *Bullington* is not a case about the death penalty, nor does it rely directly on this Court's death penalty jurisprudence.

Nothing in this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981) or in the post-*Furman* line of death penalty cases lends any support to the notion that *Bullington* is limited to capital cases. To be sure, "death is different" became a common "mantra" in post-*Furman*[2] cases and in legal scholarship,[3] and some scholars spoke of a supposedly new phenomenon called "Eighth Amendment due process." But in this Court's jurisprudence, death is only different in the sense that it is largely in death penalty cases that this Court has relied *on the Eighth Amendment* to require of the states special criteria or procedures to ensure equitable and reliable punishment outcomes. By contrast, in capital cases where the Court

[2] E.g., *Lockett v. Ohio*, 438 U.S. 586, 604 (1981) (relying on " 'the predicate that the penalty of death is qualitatively different' " from any other sentence," quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

[3] E.g., Margaret Jane Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 *Southern Cal. L. Rev.* 1143 (1980).

has found certain provisions of, say, the Fifth, Sixth, or Fourteenth Amendments applicable, the Court has not relied on the Eighth Amendment and has not in any way held or suggested that those holdings are necessarily limited to capital cases.

The post-*Furman* cases often cited for the "death is different doctrine" easily fall into either of these two categories.

Category One: First come those which rely expressly on the Eighth Amendment to ensure that capital trial or penalty phase procedures provide the reliability required under the Eighth Amendment to prevent arbitrary or capricious outcomes. Certain procedures or criteria are necessary to prevent the penalty trial from leading to "cruel and unusual" death sentences.

Thus, *Gardner v. Florida*, 442 U.S. 95 (1970) (per curiam) relies expressly on the Eighth Amendment in holding that *ex parte* disclosure of a presentencing report raises a concern about arbitrary and unreliable outcomes in the death sentencing process.

Further, *Beck v. Alabama*, 447 U.S. 625 (1980) holds that the Eighth Amendment may require a lesser-included offense instruction in a capital trial even where state law would otherwise normally and constitutionally preclude a lesser-included offense instruction.

Finally, *Godfrey v. Georgia*, 446 U.S. 420 (1980) imposes stringent requirements on the state to narrow and clarify its aggravating circumstances, relying on the Eighth Amendment to ensure fair and equitable outcomes in penalty trials.

Category Two: By contrast, other cases often (erroneously) cited for the principle that "death is different" find violations of the Fifth, Sixth, or Fourteenth Amendments in the circumstances of capital cases, but explicitly do *not* rely on the Eighth Amendment, and are logically applicable to non-capital cases as well. These cases merely discover in the unusual (not unique) form of the penalty trial an occasion for announcing rules of criminal procedure that can and must logically apply in comparable non-capital procedures as well.[4]

Thus, *Estelle v. Smith*, 451 U.S. 454 (1981) holds it a violation of defendant's Fifth and Sixth Amendment rights to permit a state-appointed psychiatrist to testify to statements made in a state-ordered examination when defendant had not received his *Miranda* warnings or been offered counsel before the examination. Nothing in *Smith* indicates that the decision turns on its being a capital case. The outcome would have been the same had the psychiatrist's disclosures been introduced at the guilt phase.

Further, *Green v. Georgia*, 442 U.S. 95 (1980) (per curiam) forbids a state to apply its otherwise legitimate hearsay rule to bar admission of an out-of-court inculpatory statement by a third party. This holding is solely and

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[4] Of course, the pre-*Furman* case of *Witherspoon v. Illinois*, 391 U.S. 561 (1968) relied on the Sixth and Fourteenth Amendments in forbidding categorical "death-qualification" in a capital trial, but, unlike the issues in the two categories of cases discussed here, "death qualification" by definition cannot apply outside a capital case.

explicitly based on the earlier, non-capital case of *Chambers v. Mississippi*, 410 U.S. 284 (1973), applying the *Chambers* doctrine that the state hearsay law must yield to the due process clause where its application would operate "mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. at 302, quoted in *Green v. Georgia*, 442 U.S. at 97. Notably, the dissent in *Green* reaches back through *Green* to attack the underlying principle of *Chambers*, and nowhere even mentions the capital nature of the *Green* case. *Green v. Georgia*, 442 U.S. at 98 (Rehnquist, J., dissenting).

Bullington clearly fits into this second category of capital cases. *Bullington* accepted the Missouri state death penalty procedures as state law. It nowhere assumes that those specific procedures were constitutionally required, other than to make the obvious observation that they were a complex of procedures designed to meet the Eighth Amendment reliability standards of *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976). *Bullington* then became a case about *general* criminal procedure – about the application of the Fifth Amendment's double jeopardy clause to a criminal trial, and the key to it was therefore the observation that the Missouri penalty phase had become in effect a criminal trial. *Bullington* never mentions the Eighth Amendment and nowhere suggests that the capital nature of the potential penalty is directly relevant to the holding at all. Rather, it is the trial-type nature of the procedural structure – a structure that just happens in this area to have been designed in response to Eighth Amendment cases – that calls for application of the Double Jeopardy Clause.

This Court in 1980 had every opportunity to limit *Bullington* to death penalty cases, especially by invoking death-is-different rhetoric to distinguish the recently published case of *United States v. DiFrancesco*, 449 U.S. 117 (1980). *Bullington* nowhere invokes the "death is different" phrase, in any of its variants, nor does "death is different" appear anywhere in the Justice Blackmun's opinion. Indeed, the Court deliberately eschews any reliance on the Eighth Amendment whatsoever.

B. Construing *Bullington* as resting on a "death is different" rationale would have troublesome consequences for constitutional law.

Though treating *Bullington* as limited to capital cases might seem the constitutionally risk-averse course of action, it would actually have the opposite effect. If this Court now took the unprecedented step of saying that a rule of general constitutional criminal procedure that could logically apply to both capital and non-capital cases only applied in capital cases, it might be met by a host of expansive claims based on doctrines previously clearly delimited. For example, a defendant raising a Fourth Amendment claim about an allegedly illegal search or seizure, one that normally would be resolved in favor of the police in a non-capital case, might logically argue that the warrant or probable cause requirements must be higher in his or her case because it is capital. Or in regard to any of the complex post-*Miranda* cases, where the Court has made a close decision that the defendant in, say, a robbery case, was not in custody, or that the defendant waived *Miranda* rights, a capital defendant

might quite logically argue for greater *Miranda* protection.

Conversely, to read *Bullington* as limited to capital cases because "death is different" might paradoxically expand the reach of *Bullington* itself even in capital cases. That is, a defendant in a penalty phase proceeding lacking the "hallmarks of the trial on guilt or innocence," *Bullington v. Missouri*, 451 U.S. at 439, might logically argue that the Eight Amendment requires not only highly reliable procedures and criteria, but a specific and enumerated list of trial-type procedures and criteria. *But see Fitzpatrick v. State*, 638 P.2d 1002, 1017 (Mont. 1981) (difference between Montana and Missouri penalty phase procedures allows Montana to shift burden of proof on death penalty issues from state to defendant).

II. THE CALIFORNIA SUPREME COURT OPINION MISREADS *BULLINGTON* AND THE ENTIRE CONTEXT OF THIS COURT'S EIGHTH AMENDMENT JURISPRUDENCE.

A. The California Supreme Court wrongly treats the enhancement statute at issue as a mere matter of the defendant's "status."

Close reading of the key provisions of the California statute indicates that the "serious felony" issue requires the jury or judge to engage in a combination of fact-finding and interpretation. The commission of a serious felony cannot be equated with such a mere "status," *Monge*, 16 Cal. 4th at 838, as the defendant's age or gender.

The key provision here is *Cal. Penal Code* 1192.7. That provision, by its own terms, prohibits plea bargaining in a certain category of felonies. Section 1192.7(c)(1) proceeds to enumerate these "serious" felonies. Some of the listed felonies track fairly precisely the formal definitions of substantive crimes elsewhere in the Penal Code ("mayhem," "assault with intent to rape," etc.). Other sections, notably the ones at issue here, describe a type of culpable action that may fall within a substantive criminal provision, but do not precisely coincide with any actual provision: These include subsection 1192.7(c)(8) ("any . . . felony in which the defendant personally inflicts great bodily injury on any person . . . or any felony in which the defendant personally uses a firearm") and subsection 1192.97(c)(23) ("any felony in which the defendant personally used a dangerous or deadly weapon." These subprovisions are incorporated by reference in the general enhancement statute's definition of a serious felony, see sections 667, 1170.12. As this very case demonstrates, for a judge or jury to determine whether this "strike" charge is true requires a combination of raw fact-finding and legal interpretation, not an uncontroversial, instantly determinable matter of "status" like age or gender.

This type of adjudication is therefore distinguishable from two other types to which double jeopardy may not apply: Granting for this purpose the California Supreme Court's highly questionable assumption that double jeopardy might not apply to a narrowly ministerial fact-determination of a "status," such as gender or age, or of the merely documentary question of the validity of an earlier recording of a court judgment, *Monge*, 16 Cal. 4th at 838-39, the issue relitigated in *Monge* is far different. Yet

equally different from the "strike" issue in *Monge* is the broadly normative, subjective discretion we associate with traditional sentencing, the kind of sentencing to which *Bullington*, of course, would not apply. *See infra.*

B. The California Supreme Court engages in a series of non sequiturs.

In its misunderstanding of how state-created criminal procedure can invoke federal constitutional protections, the California Supreme Court rests its holding on a number of egregiously illogical premises and assertions.

1. "Because, in a noncapital case, a state need not provide a trial of sentencing allegations *at all*, a state that elects to provide a trial of these allegations can circumscribe the boundaries of that trial." *Monge*, 16 Cal. 4th at 833 (emphasis in original).

This assertion wholly misstates and misconceives the double jeopardy issue in this case. Once the state legislature and state courts so construct a proceeding, including certain procedural guarantees, that it takes on the form of a trial, then the state is no longer constitutionally free to simply deny any procedural rights it deems inconvenient. Indeed, that is the very core holding of *Bullington*.

2. "Constitutional law, however, does not grow inevitable by accretion; rather, each question rises or falls on its individual merits." *Monge*, 16 Cal. 4th at 834.

Even aside from the hyperbole of the word "inevitably," this statement is misleading and even flatly wrong. Again, once the state's procedures pass the threshold definition of a trial-type proceeding, the "accretion" of

elements in the proceeding does indeed then entail certain procedural rights under the Constitution, and the state may in effect have "waived" the right to treat each procedural right "on its individual merits."

3. "Moreover, many of the procedural protections that apply in a section 1025 trial rest on statutory, not federal constitutional, grounds. On the other hand, many of the elaborate procedures at the penalty phase of a capital trial originate directly in the Supreme Court's decision interpreting the federal Constitution. This distinction is relevant to our analysis because, when a state legislature has elected at its option to provide a trial-like proceeding to resolve a factual issue that a judge could otherwise resolve with no hearing at all, common sense suggests that the legislature need not provide all the procedural protections that apply in a constitutionally mandated trial." *Monge*, 16 Cal. 4th at 837.

These bizarre *non sequiturs* entirely miss the point of *Bullington*, and the phrase "originate in" is especially telling by its misleading effect. No doubt some of the Missouri procedures were inspired by federal constitutional decisions under the Eighth Amendment; that is, the states sensibly read *Furman* and later *Gregg* as requiring *some* new sort of guided discretion scheme to ensure the reliability demanded by the Eighth Amendment. But it was the specific *state*-created procedural rights in *Bullington* which caused the Court to hold that double jeopardy applied there.

Equally misleading are the terms "at its option" and "constitutionally mandated trial."

A "constitutionally mandated trial" is a trial which is deemed subject to federal constitutional guarantees because the state, "at its option," has described a category of conduct in offense-type form. Consider the pairing of cases *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977). In *Mullaney*, the state chose (one might say "at its option") to make malice – i.e., the absence of any provoking circumstances – an element of the crime of second-degree murder, and so the state bore the burden of proving that absence of malice beyond a reasonable doubt. The following case of *Patterson* confirmed that if the state (again, one might say, "at its option") instead chose to make provocation an affirmative defense, it could then impose a burden of proof on the defendant. The simple point, ignored or misunderstood by the California Supreme Court in this case, is that though the state is under no obligation to create certain statutory rights, once it does so and those rights cross a certain threshold, constitutional rights might then become attached to those statutory rights.

A helpful analogy can be found outside the criminal law area, in the law of property, specifically in the so-called "New Property" cases, as characterized in the classic article by Prof. Charles Reich, "The New Property," 73 *Yale L.J.* 733 (1964). In *Perry v. Sindermann*, 408 U.S. 593 (1972) the state had created a *de facto* tenure system for University employees, one it was under absolutely no obligation to establish in the first place. But once the state had created certain statutory entitlements or contractual understandings in regard to that employment, the

employment scheme became subject to federal constitutional restraints – i.e., the state could not deprive a person of that entitlement without due process. See also *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). Indeed, even when the state created right is explicitly qualified by a state-created procedure for termination, this Court may recognize the underlying employment as a property right and impose federal due process clause to supersede the state termination rules. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

4. "Significantly, the high court in subsequent cases has suggested that *Bullington* does not apply to noncapital cases. For example, in *Pennsylvania v. Goldhammer*, the court reaffirmed that its decisions 'clearly establish that a sentenc[ing *in a noncapital case*] does not have the qualities of constitutional finality that attend an acquittal.' " *Monge*, 16 Cal.4th at 836-37, quoting *Pennsylvania v. Goldhammer*, 474 U.S. 28, 30 (1985) (emphasis placed by Monge).

In fact, the quoted passage from *Goldhammer* is of no significance, since, as the actual text of *Goldhammer* shows, this is simply a quotation from *United States v. DiFrancesco, supra*, which was decided before *Bullington*.

5. "The [*Bullington*] court did not overrule *Stroud* . . . , which also involved imposition of the death penalty. Rather, it distinguished *Stroud* on the basis of the procedural safeguards that arise from modern death penalty jurisprudence. . . . Most of those procedural safeguards are unique to death penalty determinations and simply do not apply here." *Monge*, 16 Cal.4th at 837-38.

This too is a *non-sequitur*. If the Court did not overrule *Stroud v. United States*, 251 U.S. 15 (1919), and if its holding in *Bullington* is based on new federal constitutional guarantees in death penalty cases, then, by the California Supreme Court's reasoning, what part of *Stroud* would be left standing? That is, if pre-*Furman* death sentencing schemes of the sort employed in *Stroud* are now unconstitutional under *Furman* and *Gregg*, and if *Stroud* is still to some degree good law, *Stroud*'s continued vitality can only be in regard to sentencing schemes which do not have the trial-type "hallmarks" present in *Bullington*, a vitality which must depend on *Bullington*'s applicability beyond capital cases.

6. In its enumeration of procedural elements in the Missouri death penalty phase, the California Supreme Court inadvertently undoes its own holding. The supposedly distinguishing elements it notes in the Missouri death penalty law are either (a) present in the California enhancement law, or (b) subjective or normative issues in the Missouri death penalty law which, if anything, would *weaken* the argument for applying double jeopardy. *Monge*, 16 Cal.4th at 837. The California Supreme Court misunderstands the very premise of *Bullington* by suggesting that the "subjective" nature of the death penalty determination there was a ground for holding double jeopardy applicable. The *Monge* opinion states:

> Unlike the death penalty sentencing procedure at issue in *Bullington*, a trial of prior conviction allegations under section 1025 does not require the trier of fact to determine the existence of a

> broad range of aggravating and mitigating circumstances relating to the defendant's character. *Monge*, 16 Cal.4th at 837.

This is another *non-sequitur*. A broad normative review of aspects of a defendant's character would argue *against* application of the double jeopardy clause. Considering the breadth and subjectivity of the factual determinations at issue in *Bullington*, the failure of proof at issue in that case was more like an acquittal at the guilt phase of a criminal trial than is the failure of proof at issue here. What made the Missouri law subject to the double jeopardy clause was not the "breadth and subjectivity" of the sentencer's task, but, quite the opposite, that the "breadth and subjectivity" inherent in any death penalty scheme that was not unconstitutionally mandatory, see *Woodson v. North Carolina, supra*, was significantly *constrained* in the Missouri law by certain formal aggravating and mitigating criteria and trial-type procedures.

7. In treating the enhancement proceeding at issue as a minor ministerial matter, the California Supreme Court has completely misconstrued the very nature of double jeopardy law. The California Supreme Court asserts:

> The trial is not a prosecution of an additional criminal offense carrying the stigma associated with a criminal charge; rather, it is merely a determination, for purposes of punishment, of the defendant's status, which, like age or gender, is readily determinable from the public record. *Monge*, 16 Cal.4th, at 838.

Yet the same can be said of the aggravating circumstance of prior felony convictions or other murders in any death penalty statute. Status is a meaningless concept here. The California Supreme Court also asserts:

> Finally a prior conviction trial is simple and straightforward as compared to the guilt phase of a murder trial. Often it involves only the presentation of a certified copy of the prior conviction along with the defendant's photograph and fingerprints. . . . This abbreviated proceeding, at which the prosecution presented only documentary evidence and defendant presented no evidence, is hardly comparable to the penalty phase of a capital trial, which was the trial-type proceeding at issue in *Bullington*. . . . Significantly, the defendant does not need to sit for weeks or months while witnesses describe in detail to a jury and the public the specifics of his alleged unlawful activities. *Monge*, 16 Cal.4th at 838.

First, this astounding statement is belied by the very facts of this case, where the documentary evidence was deemed insufficient to prove the special facts underlying the identification of a "serious felony." Second, it trivializes double jeopardy law to suggest that the key issue in double jeopardy is the length or complexity of the evidentiary phase of a trial. The key to double jeopardy is the concern for *closure* of a defendant's vulnerability to punishment after it has been properly adjudicated or determined. Perhaps the dominant contemporary scholar of constitutional criminal procedure, Professor Akhil Amar, has made this point forcefully in his important new article, "Double Jeopardy Law Made Simple," 106 *Yale L.J.* 1807 (1997). Prof. Amar stresses that double

jeopardy law, in the context of successive prosecutions, means that the prosecution gets one fair chance to convict or punish the defendant in an error-free proceeding; he stresses that jeopardy may continue until an error-free result is obtained, but the defendant is placed "twice in jeopardy" when after an error-free proceeding, that prosecution tries all over again. 106 *Yale L.J.*, at 1840-41. As Prof. Amar shows, the gravamen of double jeopardy thus has nothing necessarily to do with the specific form the second adjudication takes, but the mere fact that it is allowed to begin at all.

III. THE CALIFORNIA SUPREME COURT WRONGLY RELIES ON THE *CASPARI* DECISION AS STRONG SUPPORT FOR THE STATE'S POSITION IN THIS CASE

In *Caspari v. Bohlen*, 510 U.S. 383 (1994), this Court rejected as a threshold matter, a habeas corpus claim for application of the double jeopardy clauses to a Missouri enhancement proceeding. *Caspari*, of course, relied on *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), to hold that the rule of decision argued for by the defendant in that case would be a "new rule" and hence not cognizable on habeas corpus. In so doing, the Court reviewed lower-court decisions in the area of double jeopardy and enhancement proceedings and found considerable support for the state's position in that case, though a fair amount of lower court precedent on the defendant's side as well. Under those circumstances, of course, the *Caspari* Court held that the claim was *Teague*-barred. As a *Teague* case, of course, *Caspari* did not resolve the merits of the double jeopardy issue raised by the habeas petitioner.

Yet even if some reliance on *Caspari* were warranted, the issue addressed (though not resolved) in *Caspari* was starkly different from the one now before this Court. Though *Caspari* involved a double jeopardy claim about an enhancement statute, its facts, and the state law at issue there, are significantly different from this case. In *Caspari*, the effect of finding the defendant a persistent offender was not to impose a higher sentence on him as a matter of law. Indeed, by itself, it has no substantive effect at all. Rather, a finding of persistent offender status had the important but procedural effect of shifting the power to sentence defendant from the jury to the judge. *Caspari*, 510 U.S. at 386-87. This is far different from both *Bullington* and the present case, where the finding to which the defendant argues double jeopardy should be applied directly and explicitly carries with it an extra substantive sentence. Even if discussion of a constitutional issue in a *Teague* decision can bear on a later direct appeal case, similarity between the *Teague*-barred claim and the claim in direct appeal would have to be far closer than obtains between *Caspari* and *Monge*.

CONCLUSION

Because the California Supreme Court decision rests on egregious misconceptions of death penalty law, criminal procedure doctrine, and the relationship between state-created statutory and federal constitutional rights, the decision below requires reversal.

Respectfully submitted,

ROBERT WEISBERG
Stanford Law School
Stanford, CA 94305
(650) 723-0612
Counsel for Amicus Curiae
NACDL